

FEB 20 1967

NO. 21131 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REIN NEGGO, JR. ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

FEB 20 1967

WM. B. LUCK, CLERK

CHARLES A. LAUFER

14120 Victory Boulevard
Van Nuys, California

Attorney for Appellant



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Attorney for Appellant



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STATEMENT OF THE CASE

This is an appeal by Rein Neggo, Jr., the defendant in the District Court, from a judgment, adjudging said defendant guilty of embezzling mail. The defendant was found guilty of violating Title 18, United States Code, Section 1709. The defendant was tried and found guilty of having embezzled the mail specified in the indictment. His sentence was suspended and he was placed on probation for a period of two years, pursuant to Title 18, United States Code, Section 5010(a). Prior to the trial, the defendant duly noticed, filed and served his motion for an order to suppress the evidence specified in the indictment. Defendant based his motion

upon the following grounds:

- (1) That the evidence specified and alleged in the indictment was unlawfully obtained;
- (2) That the defendant's arrest was unlawful;
- (3) That the defendant was denied the right to counsel within the meaning of Escobedo v. State of Illinois.

Upon the hearing of the motion prior to the actual trial itself, the defendant contended: (1) that the arresting officers, who were United States Postal Inspectors, had no right to make an arrest under federal law; (2) that the arrest was not made legally, by the Postal Inspectors, as private citizens under the laws of the State of California; (3) that the search of the defendant's dwelling, subsequent to the arrest, and the seizure of the evidence in said dwelling, was unlawful under federal law; (4) that the search and seizure, after the making of the arrest, was unlawful because the arrest itself was unlawful; (5) that federal law expressly prohibits Postal Inspectors from searching a private dwelling; (6) that the purported consent of the defendant to the search and seizure was not free nor voluntary; (7) that the Government's failure to comply with Section 847 of the California Penal Code invalidated the arrest.

The defendant's motion was supported by his affidavit, and points and authorities duly filed and served with the Court and upon the Government.

Defendant's motion to suppress the evidence came on duly to be heard prior to the actual trial itself, based upon his affidavit and the points and authorities filed in support thereof, and upon the

affidavits and points and authorities filed by the Government. At the time said motion was heard, the arresting officers, United States Postal Inspectors, were duly cross-examined by defendant's counsel.

The District Court denied defendant's motion to suppress and the defendant was then tried for the offense charged. At the time of the trial, the defendant objected to the introduction of the evidence specified in the indictment on the same grounds as were used to support his motion to suppress the evidence, which objection was overruled. To facilitate a speedy trial, a stipulation was entered into between the Government and the defendant, which was expressed by the Court on page 104 of Reporter's Transcript, commencing with line 10 through line 25, as follows:

"THE COURT: All right. Then it is stipulated that the defendant objects during the course of trial to the receiving in evidence of all matters raised -- all matters objected to in his motion to suppress, which has heretofore been heard by the court, and it is stipulated that the affidavits heretofore filed by the defendant and by the Government be considered in connection with the question of the admissibility of such evidence, and that the affidavits be treated as the direct testimony of the witness and that all oral testimony given in connection with the hearing on the motion to suppress shall be deemed to be evidence in this cause for the purpose of ruling upon

the admissibility of evidence, and all objections heretofore made by the defendant in connection with this hearing, upon the hearing of his motion to suppress, are deemed to have been made during the course of the trial of the cause."

The stipulation so expressed by the Court was duly stipulated to and accepted by the Government and by the defendant [Clk. Tr. p. 105, lines 1-5].

The appellate jurisdiction of the Court of Appeals is invoked by the defendant in accordance with Title 28, Sections 1291 and 1294 of the United States Code.

**EVIDENCE PRESENTED ON DEFENDANT'S
MOTION TO SUPPRESS**

The evidence presented at the hearing on defendant's motion to suppress the evidence specified in the indictment, consisted of defendant's affidavit in support of his motion and counter-affidavits filed by the Government of Stan H. Jensen and Thomas B. Johnson, the arresting Postal Inspectors. For purposes of this appeal, defendant's affidavit will not be discussed for the reason that the Trial Court obviously did not consider its contents. Defendant's discussion will be limited to the affidavits of the arresting Postal Inspectors and their testimony on cross-examination to establish that even if the Court elected to totally disregard the defendant's affidavit, it was bound, as a matter of law, to suppress the evidence specified in the indictment on the basis of the affidavits of the

Postal Inspectors and their testimony on cross-examination.

The affidavit of Stan H. Jensen, filed on April 1, 1966, appears on page 20 of the Clerk's Transcript on Appeal. The affidavit of Thomas B. Johnson, filed April 1, 1966, appears on page 24 of the Clerk's Transcript on Appeal. For the purpose of giving this Court the chronology of the events leading up to the defendant's arrest, the contents of the affidavit of Thomas B. Johnson will be first discussed.

Mr. Johnson's affidavit reads as follows:

"THOMAS B. JOHNSON, being first duly sworn, deposes and says:

"1. That affiant is an Investigative Aid, employed by the Postal Inspection Department, United States Post Office Department;

"2. That on January 27, 1966, affiant was made aware by analysis and charting that reported losses of letter mail indicated a possibility that REIN NEGGO, JR., was stealing mail;

"3. That on January 27, 1966, affiant was informed by George Clark that a test letter to one Kathy Prindle, 6810 Vantage, North Hollywood, was placed in the case used by temporary substitute carrier REIN NEGGO, JR.;

"4. That the address on Vantage was a fictitious and non-existent address;

"5. That at approximately 9:20 A. M.,

affiant personally observed REIN NEGGO, JR. , start delivering letters on Vantage Street;

"6. That at approximately 9:10 A. M. , affiant drove to the mail box at the intersection of Bellingham and De Hougne, where two test collection letters containing money, one addressed to the Foreign Missions Fund and the other to the Disabled American Veterans were deposited;

"7. That the mail box at the intersection of Bellingham and De Hougne was known by affiant to be serviced by REIN NEGGO, JR. ;

"8. That affiant made a subsequent check of the mail box at Bellingham and De Hougne which check disclosed that the two test collection letters had been picked up;

"9. That affiant kept REIN NEGGO, JR. , under surveillance until 12:05 P. M. until affiant lost track of NEGGO in traffic;

"10. That at approximately 12:20 P. M. , affiant observed NEGGO at his home carrying his uniform;

"11. That affiant, along with Postal Inspector Stan Jensen observed REIN NEGGO, JR. , return to work at the Victory Center Annex;

"12. That affiant and Postal Inspector Jensen were unable to locate any of the three test letters in the

Victory Center Annex;

"13. That affiant made Postal Inspector Jensen aware of all the details of his investigation on January 27, 1966;

"14. That at 4:20 P.M., affiant and Inspector Jensen approached REIN NEGGO, JR., as he was about to enter his car after departing from work at which time Inspector Jensen showed NEGGO his identification as a postal inspector;

"15. That affiant heard Inspector Jensen ask NEGGO whether he had returned all of his undeliverable mail to which NEGGO replied that he had;

"16. That affiant went inside the Post Office and was unable to locate any of the test mailings;

"17. That affiant returned and after informing Inspector Jensen that he could not locate the three test letters heard Inspector Jensen advise REIN NEGGO, JR., that he had the right to remain silent, the right to an attorney and that anything he might say could be used against him;

"18. That affiant asked NEGGO if he had any coins with him and that NEGGO voluntarily handed some coins to affiant and that among these coins was a marked .50 cents coin which had been enclosed in the test letter addressed to the Disabled American Veterans;

"19. That affiant overheard Inspector Jensen ask NEGGO where the rest of the stolen money and mail was and that NEGGO stated that he had some at his home;

"20. That affiant heard Inspector Jensen then tell NEGGO that he was being placed under arrest for theft of mail;

"21. That affiant observed Inspector Jensen look through NEGGO's car searching for any stolen mail;

"22. That affiant overheard Inspector Jensen ask NEGGO if they could go to his house to recover the stolen mail and that NEGGO gave affiant and Inspector Jensen permission to accompany him to his house; and

"23. That affiant drove with Inspector Jensen and REIN NEGGO, JR., to NEGGO's home."

The affidavit of Stan H. Jensen contains the following:

"STAN H. JENSEN, being first duly sworn, deposes and says:

"1. That he is a Postal Inspector for the United States Post Office Department;

"2. That at approximately 1:45 P. M. affiant met with Investigator Thomas B. Johnson at the Victory Center Annex Post Office in North

Hollywood, California;

"3. That affiant was told by Johnson that three test letters had been placed in the mails to test the honesty of temporary carrier Rein Neggo, Jr.;

"4. That affiant was made aware that the test letters were unaccounted for;

"5. That at 4:20 P. M. affiant approached Neggo as Neggo was about to enter his car and asked him some questions regarding what he had done with his undeliverable mail;

"6. That affiant showed Neggo his identification as a Postal Inspector;

"7. That affiant dispatched investigative aid Johnson to look in Neggo's case for the undeliverable mail;

"8. That after being informed by Johnson that the undeliverable test letters couldn't be located, affiant advised Neggo that he had the right to remain silent, the right to an attorney and that anything he said might be used against him;

"9. That affiant asked Neggo if he had any currency in his possession and Neggo replied that he hadn't;

"10. That affiant then asked Neggo if he had any coins in his possession, at which point Neggo voluntarily handed over some coins to investigative

aid Johnson who determined that one of the coins was a marked \$. 50 (fifty cents) piece which had been enclosed in the test letter addressed to the Disabled American Veterans;

"11. That affiant then asked Neggo where the rest of the money and mail was and that Neggo replied that it was at his house;

"12. That affiant then asked Neggo's permission to look through his car which permission was granted;

"13. That affiant then informed Neggo that he was under arrest and that he could call an attorney if he wanted to;

"14. That affiant then asked Neggo if they could go to his house to recover the rest of the stolen money and mail;

"15. That Neggo told affiant that he could come to his home and he would turn over the stolen mail and money;

"16. That affiant then proceeded to drive with Rein Neggo, Jr. and Thomas B. Johnson to the home of Rein Neggo, Jr.;

"17. That upon parking in the driveway of Neggo's home, affiant was led by Neggo to the garage where Neggo opened the garage door;

"18. That affiant went into the garage and

observed several envelopes lying on a dresser;

"19. That Neggo gathered some of the envelopes and handed them to affiant and that affiant gathered some envelopes himself;

"20. That after Neggo had turned over the letters to affiant in the garage Neggo stated that the house belonged to his parents, that the garage was a family room and that maybe affiant should leave;

"21. That affiant then left the garage and stood in the walk-way between the garage and Neggo's house while Neggo voluntarily went inside his house and returned with ten (10) one-dollar bills;

"22. That seven of these bills had test marks on them and serial numbers which matched a pre-recorded list;

"23. That affiant then took Neggo back to the Victory Center Annex and again advised him that he had a right to call an attorney;

"24. That affiant asked Neggo if he would furnish a written statement and that Neggo refused to do so, stating that he would like to talk with his attorney;

"25. That Neggo told affiant that he would appreciate it if he could be allowed to be released on his own recognizance until noon the next day as he had an appointment to see the Dean at Cal Tech regarding

admission as a student;

"26. That affiant allowed Neggo to leave on his own recognizance if he promised to return to affiant's office the next day to be arraigned before the United States Commissioner;

"27. That Neggo did in fact leave by himself and that he voluntarily returned to affiant's office the next day."

On cross-examination of Mr. Jensen, the following evidence was testified to:

"Q. Thank you. As you approached Mr. Neggo's car did you show Mr. Neggo your official identification?

"A. Yes, I did.

"Q. All right. Did you then inform Mr. Neggo that he was under arrest, as you were approaching him?

"A. No, I did not.

"Q. All right. Did you then have a conversation with Mr. Neggo?

"A. Yes.

"Q. And you had asked him what he had done with the undelivered mail, did you not?

"A. Yes.

"Q. Or undeliverable mail?

"A. That was part of the conversation, yes.

"Q. And he then told you that it was in the building, that he had left it in his case, did he not?

"A. Yes.

"Q. All right, sir. Up to that point he did not tell you that he took any mail, did he?

"A. No.

"Q. All right. You then dispatched your associate, Mr. Johnson, to the building, did you not?

"A. Yes.

"Q. And, by the way, how far is the parking lot wherein you and the defendant were located in relation to the actual post office building, in terms of feet yards or meters?

"A. Well, there is an alleyway. It is about 20 feet wide, I would say, and possibly 30 feet from where we were standing to the back of the building, as far as I --

"Q. Mr. Johnson then entered the building, is that correct?

"A. Yes.

"Q. While Mr. Johnson -- when Mr. Johnson left you and Mr. Neggo and walked to the building and then returned, how much time had elapsed, sir?

"A. Five minutes maybe.

"Q. Five minutes?

"A. As far as I can remember. It may have been more, it may have been less. I estimate five minutes.

"Q. And you were at that time talking with the defendant?

"A. Yes.

"Q. Up to that point, as I understand it, you did not inform him that he was under arrest, did you?

"A. No.

"Q. Prior to this time, prior to the time that Mr. Johnson returned, did you see the defendant take any mail? Did you physically see the defendant take any mail?

"A. No.

"Q. Did anyone tell you prior to that time that they had seen the defendant take any mail?

"THE COURT: Do you mean prior to the time that he first spoke to the defendant on this occasion?

"MR. LAUFER: Yes, sir.

"A. No.

"Q. All right, sir. Did you intend to arrest Mr. Neggo when you first approached the car?

"A. No.

"Q. You did not then know or have grounds

to believe that he had taken any mail, did you?

"A. I wasn't certain.

"THE COURT: May I have that answer?

"(Answer read.)

"MR. LAUFER: May I proceed, your Honor?

"THE COURT: Yes.

"Q. BY MR. LAUFER: You suspected that he may have, is that it?

"A. Yes.

"Q. And you were not certain because the mail, the undeliverable mail, was accessible to not only Mr. Neggo but to various people in the Post Office Department in the building, were you not?

"MR. GLASSMAN: Objection, your Honor, calling for a conclusion of the witness.

"THE COURT: Well, you can ask him if he knows.

"A. I didn't know that it was accessible to others. I knew that it had been inserted in Mr. Neggo's mail.

"Q. BY MR. LAUFER: Let me ask you this question, sir. Did you physically visit the spot where the mail was inserted by Mr. Neggo prior to the conversation we just talked about?

"THE COURT: Let's see. May I have that question?

(Question read.)

"THE COURT: Inserted by Mr. Neggo?

"MR. LAUFER: Yes. You see, your Honor, I am referring to undeliverable mail. When it is returned by the carrier it is placed in a certain spot.

"THE COURT: All right.

"MR. LAUFER: What I am trying to ascertain is whether this witness prior to discussing this matter with Mr. Neggo had occasion to visit the spot in the building wherein the mail is deposited by the carriers when it is undeliverable.

"A. No, I had not. I had not personally visited that very spot, no.

"Q. Are you familiar, sir, with the setup in the Post Office Department as to what procedure they use in depositing mail?

"A. Yes.

"Q. It is not under lock and key, is it?

"A. No.

"Q. The man in charge, his immediate supervisor would have access to it, would he not?

"A. Yes.

"Q. The other carriers would, would they not?

"A. Yes.

"THE COURT: Is this a branch post office?

"THE WITNESS: This is the carrier unit of the North Hollywood Post Office at Victory Center.

"THE COURT: Do you know how many carriers there were on duty there that day?

"THE WITNESS: I don't know. I would assume there might have been 30.

"THE COURT: And do you know the hours at which they returned that day?

"THE WITNESS: I observed carriers coming in there between the hours of possibly 1:30, 2:00 o'clock and 3:30, 4:00, thereabouts.

"THE COURT: When did you observe Mr. Neggo coming in that day?

"THE WITNESS: I observed him come back to the station, or to the carrier unit, about 2:40 P. M.

"THE COURT: And what time did you first speak to him that day?

"THE WITNESS: I would estimate about 4:20, 4:15 to 4:20.

"THE COURT: You may proceed, Mr. Laufer.

"MR. LAUFER: Thank you, your Honor.

"Q. So as between the time that he came in and the time that he left there were numerous carriers and postal employers in this area in the building, were there not, sir?

"A. Yes.

"Q. So that any one of them, there was a possibility at least, that any one of them could have taken it, isn't that so?

"A. If the letter had been available to them, yes.

"Q. But you didn't know that they weren't available to them, did you, at the time you first approached Mr. Neggo?

"A. Well, I had been told by Mr. Johnson and the supervisors that the letter was placed in Mr. Neggo's mail and that he had it and taken it out for attempted delivery, or whatever he was going to do with it. So, as far as I knew, he was the last employee to have it in his hands.

"Q. All right, sir. Did you check Mr. Neggo or the slot wherein he would ordinarily deposit this mail?

"THE COURT: That is, upon his return?

"MR. LAUFER: Upon his return.

"A. I did not personally do so.

"Q. Did anyone else?

"A. Yes.

"THE COURT: Who, if you know? Without telling what they said, did someone tell you he had?

"THE WITNESS: Yes. Mr. Johnson told me and Mr. George George Clark and Mr. Harry Ross,

the latter two being supervisors.

"MR. LAUFER: May I proceed, your Honor?

"THE COURT: Yes.

"Q. BY MR. LAUFER: After Mr. Neggo came in numerous people were coming and going, were they not, in the post office?

"A. Yes.

"Q. So any one of these people could have, at least there was a possibility, could have taken -- strike that -- had access to this spot wherein the defendant would ordinarily deposit the mail, would he not?

"MR. GLASSMAN: Objection, your Honor. It has been asked and answered on at least two prior occasions.

"THE COURT: Yes. He has already answered it.

"Q. BY MR. LAUFER: Yet after having discussed this matter with your associates, Messrs. Johnson and Clark, you didn't really know that this defendant took the mail, did you, before you talked to him?

"A. I didn't know for sure until I talked to him, no.

"THE COURT: When did you talk to him?

"Withdraw that. Go ahead, counsel.

"Q. BY MR. LAUFER: But you say you suspected him?

"A. Yes.

"Q. Did you suspect anybody else?

"A. No.

"Q. Why did you suspect him?

"A. We had some background information in my office. We chart all the losses on the various post offices, and incident to the charting his name appeared as the employee who had handled a number of letters that had not shown up, that had been lost, and therefore he became a candidate for possible testing as a --

"Q. Possible testing?

"A. -- as a suspect.

"Q. But prior to that time, at no time did you ever catch, see or hear about this defendant stealing mail, did you?

"THE COURT: He has testified as to his background information on it, counsel. This is not a jury trial.

"MR. LAUFER: I know.

"THE COURT: I assume that what he said is what was his basis. He didn't say that he caught him stealing mail prior to that time." [Rep. Tr. p. 29, line 7 to p. 37, line 7.]

"Q. BY MR. LAUFER: I am reading from point No. 8 of your affidavit, on page 2, and I quote:

" 'That after being informed by Johnson that the undeliverable test letters couldn't be located, affiant advised Neggo that he had the right to remain silent, the right to an attorney and that anything he said might be used against him. '

"Did you at that time tell him he was under arrest?

"A. I didn't tell him he was under arrest in the same breath that I advised him of his rights. I told him, I advised him of his rights, and at that time I said, 'It looks like we have a criminal matter here and, therefore, you are entitled to know your rights', and I told him the rights as stated in the affidavit, and then I asked him if he would produce the contents of his pockets, which he did.

"MR. LAUFER: May I have just a moment, if your Honor please?

"THE COURT: Yes.

"Q. BY MR. LAUFER: Point No. 10 is:

" 'That affiant then asked Neggo if he had any coins in his possession, at which point Neggo voluntarily handed over some coins to investigative aide Johnson who determined that one of the coins was a marked \$.50 piece which had been enclosed

in the test letter addressed to the Disabled American Veterans. '

"He was under arrest at that time, was he not, Mr. Jensen?

"A. As soon as I identified the coin at that time I told him that he was under arrest for theft of mail.

"Q. But that was after, after you had stated in point No. 8 that you had advised him to remain silent and --

"THE COURT: Of his right to remain silent.

"MR. LAUFER: Right.

"Q. So that it wasn't until he emptied his pockets and handed over the money and his wallet that you told him he was under arrest, isn't that so?

"A. Yes. When he handed the evidence to us and we identified it then we told him he was under arrest." [Rep. Tr. p. 41, line 4 to p. 42, line 19.]

"Q. BY MR. LAUFER: After the car was searched and after the arrest was made, did you in substance make a statement to the defendant, 'Now let's go to the house and get the mail, or get the letters'?

"A. I don't know that I said it that way. I did ask him his permission. I asked him if he would

"Q. Who did?

"A. Mr. Johnson did.

"Q. Did Mr. Johnson inform you that he had seen the defendant take any mail?

"A. No. He didn't say he had seen him take any mail." [Rep. Tr. p. 49, lines 13-21.]

"Q. BY MR. LAUFER: With reference to paragraph 5, and I quote:

" 'That at 4:50 p. m. affiant approached Neggo as Neggo was about to enter his car and asked him some questions regarding what he had done with his undeliverable mail. '

"A. That is true.

"Q. All right, sir. Did you discuss anything pertaining to this undeliverable mail after Mr. Johnson had entered the building, after he had left you and Mr. Neggo?

"A. Do you mean during his absence, during that period?

"THE COURT: Yes.

"MR. LAUFER: Yes.

"A. Before he came back?

"Q. Yes.

"A. I don't recall specifically talking about that particular letter or these particular --

this particular piece of mail that Mr. Johnson was looking for. We may have said something about it, but I don't remember." [Rep. Tr. p. 52, line 19 to p. 53, line 12].

"Q. Well, looking at your affidavit specifically commencing with item 17 on page 3, and I quote:

" 'The affiant returned after informing Inspector Jensen that he could not locate the three letters, the three test letters, ' -- I am sorry -- 'heard Inspector Jensen advise Rein Neggo, Jr. that he had the right to remain silent, the right to an attorney, and that anything he might say could be used against him;

" '18. That affiant asked Neggo if he had any coins with him and that Neggo voluntarily handed some coins to affiant and that among these coins was a marked .50 cent coin which had been enclosed in the test letter addressed to the Disabled American Veterans;

" '19. That affiant overheard Inspector Jensen ask Neggo where the rest of the stolen money and mail was and that Neggo stated that he had some at his home;

" '20. That affiant heard Inspector Jensen then tell Neggo that he was being placed under arrest

for theft of mail,' does that refresh your memory, sir?

"A. Yes.

"Q. It was not until Mr. Neggo had transferred the 50-cent piece and after you had examined it that Inspector Jensen advised Mr. Neggo that he was under arrest, isn't that correct?

"A. This could be very possible.

"MR. LAUFER: Your Honor, may I approach the witness?

"THE COURT: You have already asked him, you have called his attention to the affidavit. You heard what he read from your affidavit?

"THE WITNESS: Yes, sir.

"Q. BY MR. LAUFER: Are the contents that I read to you from the affidavit true and correct, sir?

"A. To the best of my recollection they are, yes." [Rep. Tr. p. 69, line 11 to p. 70, line 24.]

"MR. LAUFER: I would like to briefly argue the matter, your Honor.

"THE COURT: Well, I have heard all of the testimony and I have thought about it a great deal. I don't think argument will be necessary.

"MR. LAUFER: There is one citation I have, your Honor, that I would like to submit.

"THE COURT: What is it?

"MR. LAUFER: That is Section 841 of the Penal Code of the State of California. It is my contention that the Government, that the postal inspectors --

"THE COURT: Is that the section that you cited in your motion?

"MR. LAUFER: No, it is not, sir.

"May I approach the bench?

"THE COURT: Yes.

"MR. LAUFER: 841 and 847, your Honor.

"THE COURT: What is your contention? Do you think a private person has to say, 'I am a private person'?

"MR. LAUFER: No, your Honor, I don't.

"THE COURT: What is your contention?

"MR. LAUFER: My contention is that when they first approached him attention was focused upon him, there is no question about that. At that point, the minute they contacted him, they were required under the law to inform him of his constitutional rights, and the evidence is that they did not do so until Mr. Johnson came out of the post office, and --

"THE COURT: I know all of this. I am asking you what your point is about 847 and 842.

"MR. LAUFER: 841.

"THE COURT: 841 and 847.

"MR. LAUFER: 841 is that no --

"THE COURT: All right, I have read it,
But what --

"MR. LAUFER: At the time they approached him they did not tell him that he was under arrest and as a matter of fact he was.

"THE COURT: No, he was not under arrest. There is no showing that he was detained.

"MR. LAUFER: Well, he was not free to go.

"THE COURT: There is no showing to that effect.

"MR. LAUFER: There was a showing that they took the coins and everything else under color of authority --

"THE COURT: Well, they had advised him that he had a right to remain silent at that time, and he delivered the coins voluntarily, according to their testimony.

"MR. LAUFER: I think that the word 'voluntary', your Honor, was a conclusion on their part, because they told him to take it out. That appears in his affidavit.

"THE COURT: I am asking what it is about 841 that you think is significant, and 847.

"MR. LAUFER: Section 841 requires them in my opinion to tell him as soon as they approached him

that he was under arrest, because as a matter of fact he was. In Section 847 that is clearly spelled out.

"Under 847, when they arrest as private citizens, they must do one of two things, either take him to the nearest magistrate or turn him over to a police officer, and neither was done. They took him to his house. It is also obvious that the information which they got from him led them to the house.

"THE COURT: There is no showing that a United States commissioner or judge would have been available at that particular time." [Rep. Tr. p. 72, line 9 to p. 74, line 22.]

"STANLEY H. JENSEN, heretofore duly sworn, resumed the stand and testified further as follows:

"THE COURT: Mr. Jensen, approximately what time was it when you placed defendant under arrest?

"THE WITNESS: Probably about a quarter to 5:00.

"THE COURT: And that was in North Hollywood, was it?

"THE WITNESS: Yes. North Hollywood.

"THE COURT: And do you know how long it

takes to get from there to the Federal Building?

"THE WITNESS: At that time of the day I would say probably 45 minutes.

"THE COURT: And how long were you in the Neggo premises, that part of the premises known as the garage or room of the defendant?

"THE WITNESS: Oh, I would say less than 10 minutes in the room.

"THE COURT: All right. The court denies the motion to suppress.

"So we will proceed with the trial.

"Do you have any question?

"MR. LAUFER: Yes. One question.

"THE COURT: All right. I will vacate my ruling until after you have examined him.

"Q. BY MR. LAUFER: Mr. Jensen, did you tell the defendant that he had a right to be taken before a magistrate or any other official at the time you made the arrest?

"A. I don't think I told him that he had the right to be taken before a magistrate. I told him that he would be taken before the United States commissioner.

"Q. Did you have any discussion immediately at the time that you made the arrest as to where he would be taken at that time?

"A. At the immediate moment of the arrest, no. We proceeded with the rest of the conversation and we later discussed --

"Q. You searched his car after you told him he was under arrest, is that correct?

"A. Yes.

"Q. After you finished searching the car did you make any attempt to contact the U. S. marshal or the U. S. commissioner for an arrangement to place the defendant in custody?

"A. No, not at that moment.

"THE COURT: May I have the last question and answer.

(Question and answer read.)

"Q. BY MR. LAUFER: Did you make any arrangement within an hour of the arrest with any public official?

"A. No, I didn't call any public official within an hour.

"Q. Did you call any public official during the course of the evening?

"A. No, I did not.

"Q. As a matter of fact, you did not intend to take him down before any authority that night, did you?

"A. I --

"Q. Answer my question yes or no. Did you or did you not intend to take him down?

"A. Well, I had not made up my mind for a couple of hours whether I was going to take him down to the county jail and book him or allow him to go home and report in the morning, to come to the commissioner's office.

"Q. You kept him for two hours and you had not made up your mind as to whether or not you were going to book him?

"A. Within a couple of hours time, an hour, hour and a half.

"MR. LAUFER: Thank you. I have no further questions.

"THE COURT: Well, an hour or an hour and a half from when, from the time you told him he was under arrest?

"THE WITNESS: Yes.

"THE COURT: Well, how long did you stay at the parking lot near the post office after you told him he was under arrest?

"THE WITNESS: Only for the length of time required to make the search of the car, which was probably ten or fifteen minutes.

"THE COURT: And then you drove to his home?

"THE WITNESS: Yes.

"THE COURT: And how long were you there?

"THE WITNESS: Probably 15 minutes total.

"THE COURT: And then what did you do with him?

"THE WITNESS: Well, then he rode back to the post office with us. He had his car at the post office, and we asked him to come into the little office that we maintain there to talk with us for awhile and get some background information, and also asked him at that time if he would give us an affidavit, which he said he would not until he talked to his attorney, and that is probably where the other, roughly, hour to an hour and a half was consumed.

"THE COURT: Then you told him that he could go if he would report to the commissioner the following day?

"THE WITNESS: Yes.

"THE COURT: You told him he could go if he would voluntarily report to the United States commissioner the next day, is that right?

"THE WITNESS: Yes, sir.

"THE COURT: With respect to this marked coin which he handed you before you placed him under arrest, that was enclosed in what letter?

"THE WITNESS: That was enclosed in a

letter that was addressed to the Disabled American Veterans.

"THE COURT: What time did you get back to the post office after leaving his home?

"THE WITNESS: Probably 5:30.

"THE COURT: Did you know what hours the United States commissioner was in session in the Federal Building?

"THE WITNESS: Yes, sir.

"THE COURT: What hours?

"THE WITNESS: He is there until 4:30 in the evening." [Rep. Tr. p. 91, line 1 to p. 95, line 16.]

SPECIFICATION OF ERRORS RELIED UPON

1. The Trial Court erred in denying defendant's motion to suppress the evidence.

2. The Trial Court erred in admitting the evidence illegally obtained.

3. The Trial Court erred in finding the defendant guilty upon illegally obtained evidence.

4. The judgment of the Trial Court, adjudging the defendant guilty, is based upon illegally obtained evidence and is, therefore, against the law.

ARGUMENT

I

THE ARREST OF THE DEFENDANT WAS UNLAWFUL.

A. The case of United States v. Helbock, 76 F.Supp. 985 expressly holds that postal inspectors have no power to arrest. Ward v. United States, 316 F.2d 113 (1963), clearly approves the Helbock case. "There is apparently no federal law authorizing postal inspectors to make official arrests, i. e., because of their employment." Ward v. United States, supra, page 116, citing the Helbock case as authority for the foregoing proposition. The conviction in the Ward case was upheld on the ground that a valid citizen's arrest was made under Section 837 of the Penal Code of the State of California. It is, therefore, obvious that the validity, if any, of the defendant's arrest, has to be determined in accordance with state law in the state wherein the arrest was made, which in this case is the State of California.

The Government's argument in the District Court that Title 39, Section 3523 (2) (k) of the United States Code, impliedly authorizes postal inspectors to make an arrest was not accepted by the Court of Appeals in the Ward case.

B. The arrest of the defendant was unlawful under the state law. Although it has been held that a postal inspector may make an arrest as a private citizen, such arrest must comply with the laws of the state wherein it is made. In Ward v. United

States, cited herein, the arrest made by the postal inspectors was a citizen's arrest. In the Ward case the Court held that there was compliance with state law. It is respectfully submitted that in this case, the postal inspectors did not comply with state law. Section 847 of the Penal Code of the State of California reads, in part, as follows:

"§847. Arrest by private person; duty to take prisoner before magistrate or deliver him to peace officer.

"DUTY OF A PRIVATE PERSON WHO HAS MADE AN ARREST. A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace officer."

The evidence in this case is uncontradicted that the arrest was made at approximately 4:20 P. M. On cross-examination, Inspector Jensen was asked the following:

"Q. . . . Did you or did you not intend to take him down?

"A. Well, I had not made up my mind for a couple of hours whether I was going to take him down to the county jail and book him or allow him to go home and report in the morning, to come to the commissioner's office." [Rptr. Tr. p. 93, lines 12-17]

The foregoing answer clearly indicates that the arresting officers kept the defendant in custody for a period of two hours, when in fact they could have taken him down and booked him in the County Jail. The record is, therefore, clear that the defendant could have been turned over to a peace officer or booked at the County Jail within a matter of an hour from the time of his arrest. The reason that the defendant was kept in custody is quite obvious. The arresting inspectors wanted a confession from him, in affidavit form, and wanted to search his dwelling, which in fact they did. That the unnecessary delay invalidated the arrest is beyond any question. Consequently, all evidence obtained thereafter became inadmissible.

In People v. Martin (1964), 225 Cal. App. 2d 91, 36 Cal. Rptr. 924, the District Court of Appeal interprets Section 837 in some detail and the consequences of not complying with said section. Mr. Justice Burke, who wrote the opinion in the Martin case, cited above, states, among other things, the following:

"An officer's power of arrest, when acting beyond the limits of the geographical unit by which he is appointed, becomes that which is conferred upon a private citizen in the same circumstances."

Again, the Court continues:

"A private citizen, unlike a peace officer, may not arrest whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence or whenever he has reasonable

cause to believe that such person has committed a felony, whether or not a felony has in fact been committed (Pen. Code §§ 836, 837). The arrest being illegal, the subsequent search was also illegal and the evidence seized in the search should have been suppressed. While the search of a person being arrested by a citizen is authorized by section 846 of the Penal Code in the removal of all offensive weapons from the person of the one arrested, no express authority exists for a citizen to conduct a search of an arrested person's dwelling as an incident to an arrest. The duty of the citizen upon making a lawful arrest is to take the arrested person to the nearest or most accessible magistrate in the county in which the arrest is made and to make a complaint stating the charge against the person arrested (Pen. Code, §849) or, as an alternative, to deliver the arrested person to a police officer (Pen. Code, §847)."

In view of the interpretation of Sections 837 and 847 of the Penal Code of the State of California, and the obvious violation thereof by the postal inspectors in this case, it is quite obviously unnecessary to discuss as to whether or not the arresting inspectors in the instant case did or did not have probable cause to make the arrest. Their failure to comply with Section 847 makes the

arrest unlawful.

II

THE EVIDENCE SPECIFIED IN THE INDICT- MENT WAS OBTAINED THROUGH UNLAWFUL SEARCH AND SEIZURE

It is respectfully submitted that the act of searching defendant's dwelling and seizing the evidence alleged in the indictment was unlawful. In the first place, the search was not incidental to the arrest and was made some distance from the place of arrest. Consequently, it cannot be reasonably argued that this was a search incident to an arrest.

Secondly, the search conducted by Inspectors Jensen and Johnson was an express violation of Title 39, Section 903, United States Code, which reads as follows:

"§903. Searches authorized

"The Postmaster General, by letter of authority filed in the Department, may authorize any postal inspector or other officer of the Department to make searches for mailable matter transported in violation of law. When the authorized officer has reason to believe that mailable matter transported contrary to law may be found therein, he may open and search any --

"(1) vehicle passing, or having lately passed, from a place at which there is a post office of the



United States;

"(2) article being, or having lately been, in the vehicle;

"(3) store or office, other than a dwelling house, used or occupied by a common carrier or transportation company, in which an article may be contained."

Said Section states that the Postmaster General, by letter of authority filed in the Department, may authorize any Postal Inspector or other officer to search various premises. Sub-Section 3 of Section 903 expressly excludes a dwelling house from the authorized searches. Consequently, the act of the officers searching the dwelling house of the defendant was unlawful and unauthorized. In view of the fact that Sub-Section 3 expressly excludes a dwelling house, it is clear that even if the Inspectors had a warrant to search the dwelling house of the defendant, they could not do so in light of the express exclusion made in Subsection 3. There is, therefore, no question but that this Section is applicable to the instant case and that Inspectors Jensen and Johnson had no authority to enter or search the dwelling house of the defendant.

An examination of the affidavits of Inspector Jensen and Inspector Johnson clearly indicates that they entered the defendant's home after they had made the arrest. The defendant, of course, denied that he had given the inspectors any consent. However, even if such consent were given, it would, as a matter

of law, be involuntary. Consent given in submission to an express or implied assertion of authority cannot be said to be free nor voluntary. People v. Michael, 45 Cal. 2d 751, 290 P. 2d 852.

"Accordingly, both the purported consent of the defendant for search and the fruits of that search must be deemed to have been inadmissible as evidence against defendant."

People v. Michael, cited hereinabove. People v. Burke, 47 Cal. 2d 45, 301 P. 2d 24, 44 Cal. Jur. 2d 342.

Permission granted after a person has been improperly arrested and searched, while he is still in custody and has not been informed of his legal right to refuse permission, is not a real and proper consent to search. U. S. v. Lerner, 100 F. Supp. 765.

The rationale behind the rule set forth above regarding the issues of consent and voluntariness is obvious. A person who has been arrested and who is in custody can hardly refuse to do anything which he is told to do by the arresting person because by refusing to do so, the person arrested might very well be charged with resisting an arrest.

It is to be noted that the postal inspectors do not deny the statement of the defendant, set forth in his affidavit, that he was taken by them in their car to his home. The inspectors, in fact, admit having removed the letters from his home.

III

THE DEFENDANT WAS DENIED THE RIGHT TO COUNSEL

If the argument of the Government is to be accepted, that the postal inspectors had probable cause to make the arrest, it must be done so on the basis of their statements that they had been following the defendant during the day and suspected him of having stolen the mail. If this is so, then their investigation had in fact focused upon the defendant within the meaning of Escobedo v. State of Illinois, 378 U. S. 478, 84 S. Ct. 977, 12 L. Ed. 2d 1758, and when they first approached him, they had to, as a matter of law, inform him of his constitutional rights to counsel and to remain silent. The affidavit of Stan H. Jensen, commencing with Paragraphs 5 through 8, inclusive, indicates that the defendant was not immediately advised of his constitutional rights. In fact, said affidavit corroborates the defendant's contentions. Inspector Jensen states that after having approached the defendant, he asked him some questions regarding what the defendant had done with his undeliverable mail; that said inspector showed the defendant his identification card, that said inspector Johnson was then despatched by Mr. Jensen to the building to check on the undeliverable mail, that after being informed by Mr. Johnson that the undeliverable mail could not be located, Mr. Jensen advised the defendant of his constitutional rights. It is obvious, therefore, that Inspector Jensen and the defendant had a

discussion prior to giving him any advice as to his constitutional rights. It was only after Mr. Jensen had been told that the letters were not in the post office building that he advised the defendant of his constitutional rights to counsel. Consequently, the defendant was denied his right to counsel as required by law. If it be assumed that the argument of the Government is correct, i. e. that the postal inspectors had probable cause to arrest the defendant because of the surveillance conducted on January 27, 1966, then obviously the investigation had focused upon the defendant even prior to the time that the postal inspectors approached the defendant in the parking lot. If that is the case, then the principles propounded in the Escobedo case are here clearly applicable. The Escobedo case provides that where the investigation is no longer a general inquiry into an unsolved crime, but has begun to focus upon a particular suspect and the suspect has been taken into custody, and the officers carry out a process of interrogation that lends itself to eliciting incriminating statements, and the officers have not effectively warned the suspect of his absolute constitutional right to remain silent, the accused has been denied assistance of counsel in violation of the Sixth Amendment to the Constitution of the United States.

The evidence is conclusive that Mr. Jensen, Senior Inspector in this case, exhibited his badge to the defendant as he approached the defendant's car. By so doing, he clearly restrained the defendant's movements and as a matter of substance, the arrest took place at that time. It is common knowledge that

an employee, approached by a superior, is going to submit to the authority of the superior for fear of losing his job in not submitting. That this happened in this case, is rather obvious. That the postal inspectors intended to make the arrest as they approached the defendant is beyond question. Their only purpose in failing to immediately inform the defendant that he was under arrest was clearly intended to elicit incriminating evidence from him, which is exactly what happened.

CONCLUSION

It is respectfully submitted that the affidavits filed by the Government in opposition to defendant's motion and their testimony on cross-examination conclusively support defendant's contentions made herein. That because of the unlawful arrest made by the Government and because of the unlawful search and seizure, the District Court should have granted defendant's motion to suppress the evidence specified in the indictment. That in view of the fact that the judgment of the Court rests upon illegally obtained evidence, it is prayed that said judgment be reversed and that the District Court be directed to dismiss the proceedings against the defendant.

Respectfully submitted,

CHARLES A. LAUFER

Attorney for Appellant

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Charles A. Laufer

CHARLES A. LAUFER

